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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 468

THE COLSON CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 20-44) is reported at 347 F. 2d 128. The Board's Decision and Order (J.A. 316-326)[1] are reported at 148 NLRB 827.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1965, and a petition for rehearing was

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[1] "J.A." references are to the printed record prepared for the court of appeals and filed with the petition.

denied on July 9, 1965 (Pet. 2). The petition for a writ of certiorari was filed on August 19, 1965. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the employer was obliged to recognize the union as the representative of his employees and properly ordered him to bargain with the union.

2. Whether the Board's finding that the employer was responsible for coercive anti-union conduct by businessmen in the community was supported by substantial evidence.

3. Whether, in the circumstances of this case, a "walk out" by certain employees protesting the employer's selection of a "leadman" was a concerted activity protected by Section 8(a)(1) of the Act.

4. Whether the Board's finding that the employer, through its supervisors, threatened and coerced employees in violation of Section 8(a)(1) is supported by substantial evidence.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 18-19 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. The Caruthersville Industrial Development Corporation ("CIDC") was formed by citizens of Caruthersville, Missouri, for the purpose of attracting new industry to the area. The president of CIDC was Gordon Wright; Horace Dunagan, president of the local bank, served as vice president. In addition to Wright and Dunagan, other local businessmen were CIDC stockholders. (J.A. 285; 27, 30, 222.)

In 1962, after petitioner Colson Corporation ("the Company") had decided to establish a plant in Caruthersville, an organization called R & R Corporation ("R & R") was set up with a capital of $500 furnished by CIDC (J.A. 285; 67-68). R & R was formed in order to conceal the Company's name in the negotiations with the city, and to enable the Company to close down its plant in Ohio without publicity concerning the move (*ibid.*). The president of R & R was Wright; Dunagan served as its vice president; and Company attorney James Reeves was its secretary (J.A. 285; 27, 30, 67-68).

Construction of the Company's new plant began in June 1962, a few employees commenced working in July, but the plant did not officially open until September 17, 1962 (J.A. 285; 194, 207). During the construction and early production phase, Company Vice President George Jones and other Company officials were actively managing the plant and were paid directly by the Company (J.A. 285-286; 192, 198, 207-208). But, new employees were informed

that they were working for R & R and, upon being hired, were given a booklet of work rules which referred to their employer as R & R (J.A. 287; 259-269). The wages of rank-and-file employees and other administrative expenses were paid with R & R checks signed by Dunagan. R & R, in turn, was reimbursed by Colson for all of these expenditures. None of the officers of R & R had any management functions and all served without compensation (J.A. 286, 287; 29-30, 68, 207-208).

On November 30, 1962, the officers of R & R resigned and transferred their shares to Colson officers.[2] Later Colson directed that R & R be liquidated, a directive that was being carried out at the time of the Board hearing (J.A. 286; 67-68). CIDC was reimbursed by Colson for its initial investment of $500 in R & R, the lease between R & R and the city was cancelled, and a new lease between the city and the Colson Corporation was executed (J.A. 67-68).

2. In late December and early January 1963, the Union[3] began an organizational campaign among the Company's employees. On January 3, 1963, the Union sent a telegram to Company Plant Manager William Sheffield, informing the Company of its campaign and that employees Odell Thornton, Harlin Crayne, Herman Goodwin, Ralph Elkins, and Herman Miller were acting as members of its organizational committee (J.A. 279; 249). This telegram was received

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[2] The employees were never notified of R & R's "departure".

[3] International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.

by the Company the next morning, January 4 (J.A. 279; 172-173, 249).

The same day, a group of about 25 local businessmen met to discuss the news of the Union's arrival (J.A. 279-280; 173, 187-188). Otis Hardy, a businessman who attended this meeting, explained that Mayor Rogers informed the group that the Union "was going to try to come in to Colson the next day, and asked if the businessmen would try and contact some of the employees that night to see if they would hold off voting to bring the Union in for some little time in order to let Colson get through their probationary training period . . ." (J.A. 279-280; 188). It was further suggested that the men pair off and contact the employees to persuade them to vote against the Union (J.A. 280; 189-190).

3. By January 8, 1963, the Union had obtained 29 authorization cards in a unit conceded by the Company to be appropriate (J.A. 290-292; 5, 9, 71-73, 86-87, 97-99, 106-107, 108-109, 112-113, 120, 123-124, 127-128, 130-132, 134-136, 138-139, 141-143, 145, 146-148, 152-153, 183-184, 185-186, 233-247).[4] The parties stipulated that on this date there were 57 employees in the unit (J.A. 290; 23, 228-229). Union representatives Kincaid and Russell went to the Company's plant, spoke to Plant Manager Sheffield, and gave him a letter stating that the Union represented a majority of the Company's employees, requesting recognition as their representative, and offering to

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[4] The authorization card recited that the signer was thereby selecting the Union "as my collective bargaining agent" (J.A. 290, n. 3).

submit the authorization cards to a neutral third party for checking (J.A. 278; 154-155, 250). After reading this letter and being orally informed by Russell that the Union was willing to submit the cards for authentication, Sheffield refused to recognize the Union (J.A. 278; 154-155).

On January 10, the Union filed a representation petition accompanied by 32 authorization cards (J.A. 278; 155-157, 258). On January 14, the Company sent a letter to the Union confirming its prior refusal to recognize the Union (J.A. 251). A Board election was held on March 22, which the Union lost, but timely objections were filed (J.A. 278; 157; G.C. Exh. 12). On May 8, the Regional Director issued his report on the objections, recommending that the election be set aside on the ground that Company conduct had created an atmosphere in which a free and fair election could not be held (J.A. 278; G.C. Exh. 12). On May 28, the Union filed the unfair labor practice charges which initiated the instant case, and a complaint was issued on them in October (J.A. 276).[5]

4. The conduct which formed the basis for setting aside the election and for some of the unfair labor practice charges was as follows: On January 4, 1963, after the meeting of the businessmen (*supra*, p. 5), employee Mike Warren was visited at his home by furniture dealer Gordon Wright[6] and paint store

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[5] In view of the unfair labor practice proceeding, on December 9, 1963, the Board dismissed the election petition (J.A. 279; G.C. Exh. 15).

[6] As indicated, *supra*, p. 3, Wright was president of both CIDC and R & R.

owner Jackie Jones (J.A. 282; 148). Warren was told that a vote for the Union "might cause the Company to move away," and that they had the names of the Union organizers (J.A. 282; 149). About 2 weeks later, Warren was again visited by Wright; this time Wright wanted Warren to sign a card repudiating the Union so "he would know what [Warren] was going to do" (J.A. 282; 149-150). Warren refused and told Wright that he was "sick and tired of the whole mess" (J.A. 282; 150). Employees Elbert Brees (J.A. 280; 109-111), Woodrow Webber (J.A. 280-281; 142-143), Raymond Hastings (J.A. 282; 85-86), and Wendell Jones (J.A. 94-95) were also visited by local businessmen under similar circumstances and warned of dire consequences in the event the Union successfully organized the Company.

On January 5, Banker Horace Dunagan [7] and Mayor Rogers met with employees Harlin Crayne and Odell Thornton, both of whom were named as members of the Union organizational committee in the telegram received by the Company the previous day (J.A. 281; 99-100). Dunagan asked where the authorization cards were located and stated "he wanted [them] to destroy the cards or get rid of them" (J.A. 281; 100-101). Dunagan also asked how he could locate the other three members of the organizational committee (J.A. 281; 101-102). At the Board hearing, Dunagan testified that he kept a "mental list" of those employees who were for or against the Union (J.A. 180-181).

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[7] Dunagan, in addition to being an officer in both R & R and CIDC, was a daily visitor to the plant (J.A. 28).

Dunagan also spoke to employees Nebert Davidson and Paul Hundhausen shortly before the election. Dunagan visited Davidson twice, and both times inquired what he thought about the Union and expressed the desire that the Union would not succeed in organizing the plant (J.A. 283; 59-61). About 4 days before the March 22 election, Dunagan told Hundhausen that "it would be better if the union was not to come in at this time, that he had other prospects of other factories that he might possibly be able to get if we had no labor trouble at this time" (J.A. 283; 113-114).[8]

Company supervisors as well sought to dissuade the employees. Employee Gene Harwell was requested by Assembly Room Foreman James Dinnell to talk to the employees in the welding department "and find out how they felt about the Union and which way they were going to vote" (J.A. 284; 41-42). Harwell added that Dinnell "wanted me to talk to the welders and try to get them not to vote in a union" (J.A. 42). About a week before the election, Welding Department Foreman Earl Potts asked Harwell what he thought

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[8] On January 28, 1963, the Company posted the following notice (J.A. 272) at its plant:

> We have heard that some local businessmen have spoken with some of our employees concerning the organization of this plant by a union.
>
> The Company wishes it known that this was done on the businessmen's own initiative, and in that they were not authorized by the Company to speak on behalf of The Colson Corporation.
>
> W. A. Sheffield
> Plant Manager

about the Union and proceeded to question Harwell about his fellow employees. Potts also requested Harwell to talk to other employees and try and convince them that no union was needed (J.A. 284; 41-42). Employee Robert Dean was approached by Company Foreman Vernon Gantz after the election and accused of talking on behalf of the Union to other employees. Gantz warned Dean that Plant Manager Sheffield was aware of his conduct "and the next time it happens he is going to fire you" (J.A. 284; 89-92). Gantz told Dean he was giving him this information for his own benefit (J.A. 91-92).

5. Employees Nebert Davidson, Gene Harwell, Leonard Pruitt, and Henry White worked in the welding department under Company Foreman Earl Potts. In addition, the Company had a "leadman" in the department who was paid 10¢ more per hour than rank-and-file employees for helping them with production problems (J.A. 294-295; 32-33, 43-44). About May 1, 1963, the leadman quit and Potts told the welders that, thereafter, Pruitt would be the new leadman (J.A. 294-295; 32-33, 43-44, 48-49, 55-56, 64-65). However, the Company hired Jackie Norris, an inexperienced welder, and decided to promote him instead to the position of leadman (J.A. 294-295); 49, 65). On June 20, Davidson, hearing a rumor that Norris was to become the new leadman, protested to Plant Superintendent Charles Howell that "you bring this boy off the street . . . and make him leader when the job had been promised to another man . . . you are discriminating against us." (J.A. 57-58, 64). Davidson obtained no satisfaction from Howell and

the next day, the Company posted a notice that Norris was the new leadman (J.A. 294-295; 33, 55-56). The welders futilely protested to Potts that the promotion should have gone to Pruitt (J.A. 295; 33-34, 43-44, 49, 56-57), and discussed among themselves what further action to take (J.A. 295; 33-35).

On Monday morning, June 24, Davidson, acting as spokesman for the group, told Potts that "we'd give him until noon to get some action or we were going to walk out. . . . [W]e told him that we didn't want to lose our job, that we'd come back before the three days are up.[*] . . . [W]e want to protest, maybe the head office will hear about it . . . ." (J.A. 295; 57-58). At about noon on June 24, the four named welders left the plant (J.A. 295; 35, 44-45, 58-59). The next day, Company Foreman James Dinnell visited welder Harwell at his home and told him that he could not return to work unless he showed Potts a doctor's certificate. Harwell told Dinnell that he was not sick, that Potts knew the reason for his absence, and that he would talk to Potts himself the next morning (J.A. 295-296; 44-45).

The next morning all four employees reported for work at 7 a.m., the beginning of the shift (J.A. 296; 44-46). Potts met them and said they could not return to work unless they had certificates from a doctor explaining that they had been sick (J.A. 296; 35, 46, 59). When they informed Potts that they had remained absent in protest, Potts replied: "Well, the

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[*] The Company had a rule that an unexcused absence of 3 days would subject an employee to discharge (J.A. 65).

management says you can't go to work without a doctor's statement" (J.A. 296; 59, 66). They were then terminated and have never been reemployed (J.A. 296; 21-23, 46-47, 59).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Company was responsible for the conduct of the local businessmen and that, through these agents and its supervisors, the Company had violated Section 8(a)(1) of the Act by threatening and coercively interrogating employees, and by requesting them to report on the union activities of fellow employees (J.A. 281-290, 317-318). The Board also found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union since January 8, 1963, because the Company was motivated, not by a good faith doubt as to the Union's majority status, but by a desire to gain time in which to undermine the Union (J.A. 290-293, 317-318).[10] Finally, the Board found that the Company violated Section 8(a)(1) of the Act by refusing to rehire employees White, Davidson, Harwell, and Pruitt because, in protesting the selection of the new leadman, they had engaged in protected concerted activities (J.A. 294-300). The Board ordered the Company to cease and desist from the unfair labor practices found; to bargain with

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[10] The Board further found that the Company violated Section 8(a)(5) and (1) of the Act by granting wage increases to the employees on March 27 and December 16, 1963, without bargaining with the Union (J.A. 294; 102-103, 202-203, 248-249).

the Union, upon request; to offer reinstatement to the discriminatees, with backpay; and to post appropriate notices (J.A. 320-326).

C. THE COURT OF APPEALS' DECISION

The court of appeals sustained the Board's findings and enforced its order in full (Pet. 20-44).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decision of any other circuit. There is thus no occasion for further review.

1. Petitioner contends that the Board should not have ordered the Company to recognize the Union until the Union had first shown, in a secret-ballot election, that it had the support of a majority of the employees (Pet. 10-12). But, the Board found, and the court below agreed, that, at the time the Union sought recognition from the Company, it had valid authorization cards signed by a majority of the employees in the unit and that the Company, in refusing recognition, was not motivated by a good faith doubt as to the Union's majority, but by a desire to gain time in order to undermine the Union (J.A. 292-293, 317-318; Pet. 29, 35). It is well settled that, in these circumstances, an employer violates Section 8(a)(5) of the Act if he refuses to recognize the union notwithstanding that no election has been held. See *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72, and cases cited at n. 8 therein; *National Labor Relations Board* v. *Philamon Labora-*

tories, Inc., 298 F. 2d 176, 179 (C.A. 2), certiorari denied, 370 U.S. 919; *Snow* v. *National Labor Relations Board*, 308 F. 2d 687, 691, 694 (C.A. 9); *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 743 (C.A. D.C.), certiorari denied, 341 U.S. 914. In the light of the Company's subsequent unfair labor practices and the other evidence summarized in the Statement (pp. 6-9), it is clear that there is ample evidentiary support for the Board's findings.[11] Thus, the Board properly ordered the Company to bargain with the Union.

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[11] Petitioner contends that the Board erred in counting the authorization card signed by employee Downing, because he testified that he had signed the card out of fear based upon a prior experience with a different union in another city (Pet. 28-29; J.A. 121). However, where, as here, the cards were unequivocal (see n. 4, *supra*) and there is no showing that the union representatives used coercion or misrepresented the purpose of the cards at the time they were signed, the courts have consistently held that testimony by employees, given long after the cards were obtained, as to their motives in signing may not be used to impeach the cards themselves (see cases cited by the court below, Pet. 28-29). As the court below stated (Pet. 29): "The Union and the Board were entitled to rely upon this authorization card, as there was no evidence that Downing was subjected to any abuse or coercion by the charging party in the present proceedings."

Petitioner also asserts that the Board should not have counted the authorization cards of four other employees because they later signed cards repudiating the Union (Pet. 11). But, an employer "cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority." *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 687.

Nor is there merit to petitioner's further contention (Pet. 12-14) that the Board could not order the Company to bargain with the Union because, by proceeding to an election in the face of the Company's refusal to bargain, the Union waived its right to file unfair labor charges respecting that conduct. The Board enunciated this waiver rule in *Aiello Dairy Farms*, 110 NLRB 1365, but subsequently found that it did not serve to effectuate the policies of the Act. As the Board explained in *Bernel Foam Products Co.*, 146 NLRB 1277, 1280, which was followed here:

> * * * [T]here is no warrant for imposing upon the union * * * an irrevocable option as to the method it will pursue in seeking vindication of the employees' representation rights while permitting the offending party to enjoy at the expense of public policy the fruits of such unlawful conduct. The fact that in an election a vote favorable to the union may obviate for it the necessity for pursuing the unfair labor practice route does not, in our view, warrant requiring that the union forfeit the right to request that the effect upon it of the employer's unlawful conduct be rectified when it develops that such conduct has been sufficiently onerous to interfere with the election and to cause a substantial deterioration in the union's [majority] status.

The court below properly concluded that, since the rule set forth in *Aiello* was not a statutory command but a matter of Board discretion, the Board could change the rule if it found, as it did, that it did not effectuate the policies of the Act (Pet. 36-37). The view of the court below is in accord with that of the

other circuits which have had occasion to consider the *Bernel Foam* doctrine. *International Union of Electrical Workers* v. *National Labor Relations Board*, 59 LRRM 2232 (C.A. D.C.), petition for certiorari pending, No. 446, this Term; *Irving Air Chute Company, Inc.* v. *National Labor Relations Board*, 59 LRRM 3052 (C.A. 2).[12]

National Labor Relations Board v. *Flomatic Corporation*, 347 F. 2d 74 (C.A. 2) (Pet. 12), is not to the contrary. The Second Circuit, in its subsequent decision in *Irving Air Chute, supra*, indicated that the refusal to enforce a bargaining order in *Flomatic* rested on the special circumstances of that case; i.e., there was no violation of Section 8(a)(5), and the Section 8(a)(1) violation was not "flagrant." Here, there was a violation of Section 8(a)(5) and the Section 8(a)(1) violations were extensive.

2. Petitioner's contention (Pet. 15-16) that the Board erred in holding the Company responsible for the conduct of the local citizens, and in finding that

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[12] The *Aiello* rule was actually a departure from prior Board precedent. See, e.g., *The M. H. Davidson Company*, 94 NLRB 142; *Howell Chevrolet Company*, 95 NLRB 410; *Squirrel Brand Co., Inc.*, 96 NLRB 179; *Stow Manufacturing Co.*, 103 NLRB 1280; *Model Mill Company, Inc.*, 103 NLRB 1527. The earlier rule, to which *Bernel Foam* in effect returns, had been approved by the courts on many occasions. See *National Labor Relation Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C.A. 9); *National Labor Relations Board* v. *Model Mill Co.*, 210 F. 2d 829 (C.A. 6); *National Labor Relations Board* v. *Southeastern Rubber Manufacturing Co., Inc.*, 213 F. 2d 11 (C.A. 5); *National Labor Relations Board* v. *Stow Mfg. Co.*, 217 F. 2d 900 (C.A. 2), certiorari denied, 348 U.S. 964.

such conduct was coercive rather than protected free speech, presents only evidentiary issues which do not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, for the reasons set forth by the court below (Pet. 33-34), the Board was fully justified in imputing the conduct of the businessmen to the Company, and in concluding that the notice posted by the Company (n. 8, *supra*) was insufficient to erase the impression in the employees' minds of the connection between the two. Similarly, it is clear that the conduct of the businessmen in this case—attempting to have the authorization cards destroyed and threatening the employees with closing of the plant—went beyond the mere expression of views and opinion protected by Section 8(c) of the Act, and distinguishes this case from *National Labor Relations Board* v. *Salant & Salant*, 183 F. 2d 462 (C.A. 6), and *National Labor Relations Board* v. *American Pearl Button Company*, 149 F. 2d 311 (C.A. 8).

3. Petitioner's remaining contentions (Pet. 16-17) likewise present no issue warranting review by this Court. The Board found that the walkout of the welders was in protest over the failure of the Company to appoint one of their group, employee Pruitt, to the position of leadman (J.A. 296-298). Since the leadman worked in close proximity with the welders, relaying instructions to them, it is apparent that they had an immediate and direct interest in who filled that position. Accordingly, the welders, in walking out, were clearly engaging in concerted activities for

their own mutual aid or protection, within the meaning of Section 7 of the Act.[13]

Nor is there substance to the contention that the Board's holding that the interrogations here violated Section 8(a)(1) is in conflict with other decisions. Whether or not interrogation is coercive depends upon the facts of each case, and, on the facts here, there was ample basis for the Board's finding of coercion (J.A. 284; 41-42, 89-92).[14]

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[13] See *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983, 987-988 (C.A. 7), certiorari denied, 335 U.S. 845; *National Labor Relations Board* v. *Guernsey-Muskingum Electric Co-op.*, 285 F. 2d 8, 12-13 (C.A. 6).

[14] Contrary to petitioner (Pet. 17), there is nothing in the Board's decision which requires the Company to make its premises available for organizational activity without limitation. The Company, however, was seeking to bar employees from engaging in such activity not only during working time, but also during non-working time. This it could not do under principles established in *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1965

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